

JUN 29 2006

ORDER OF COMMISSIONSECRETARY OF STATE
DIVISION

In the matter of Objection No. 013-019 filed by Local Union No. 101 of the International Union of Operating Engineers (Objector) on April 6, 2006, to Annual Wage Order No. 13, pertaining to the Building Construction wage rate for the occupational title of Operating Engineers in the Missouri Counties of Greene – Section 039, Lawrence – Section 055, Taney – Section 110, Ozark – Section 077, and Vernon – Section 112 and the Heavy Construction wage rate for the occupational title of Operating Engineers in the Missouri Counties of Greene – Section 039 and Webster – Section 116; issued by the Division of Labor Standards, Department of Labor and Industrial Relations, filed with the Secretary of State: March 10, 2006.

Introduction

On March 10, 2006, the Division of Labor Standards, Department of Labor and Industrial Relations (Division) issued and filed with the Missouri Secretary of State Annual Wage Order No. 13. On April 6, 2006, Objector, by counsel, filed timely objections to Annual Wage Order No. 13, as captioned above.

Pursuant to 8 CSR 20-5.010(3)(A), a pre-hearing conference was convened on May 4, 2006, after which the Commission's designated representative issued a Pre-Hearing Order setting forth the issues in dispute for hearing before the Commission.

The Commission convened a hearing on the above-referenced Objections on May 22, 2006. Mr. Scott Brown, Esq., appeared on behalf of Objector. Mr. Michael Pritchett, Assistant Attorney General, appeared on behalf of the Division.

Counsel for Objector announced Objector's withdrawal of the following objections:

- Objection No. 14 to the Building Construction wage rate for the occupational title of Operating Engineer in Lawrence County; and,
- Objection No. 19 to the Heavy Construction wage rate for the occupational title of Operating Engineer in Webster County.

Objection Nos. 13, 15, 16, 17, and 18 proceeded to hearing. At the conclusion of the hearing, the Commission ordered the record left open to afford the parties an opportunity to file briefs no later than June 13, 2006. The Division and Objector filed briefs.

Issues for Hearing

Objector challenges the Division's initial determination to the extent it provides that:

- the prevailing Building Construction wage rate for Operating Engineers (Group III) in the Counties of Greene and Taney is \$17.85 / \$9.27 per hour;
- the prevailing Building Construction wage rate for Operating Engineers (Group II) in the Counties of Ozark and Vernon is \$14.94 / \$8.60 per hour; and,
- the prevailing Heavy Construction wage rate for Operating Engineers (Group II) in the County of Greene is \$19.93 / \$8.60.

Objector proposes a Building Construction wage rate for Operating Engineers (Group III) in the Counties of Greene and Taney of \$18.45 / \$9.27. Objector proposes a Building Construction wage rate for Operating Engineers (Group II) in the Counties of Ozark and Vernon of \$19.05 / \$9.27. Objector asserts that the Division has not considered hours (disputed hours) worked at

the rates set forth in the collective bargaining agreement between Builders Association (Springfield Area) and Operating Engineers Local No. 101.

Objector proposes a Heavy Construction wage rate for Operating Engineers (Group II) in the County of Greene of \$21.02 / \$9.30. Objector asserts that the Division has not considered hours (disputed hours) worked at the rates set forth in the collective bargaining agreement between Associated General Contractors of Missouri and Operating Engineers Local No. 101.

Findings of Fact and Conclusions of Law

Prevailing Wage Law

The Commission has a statutory duty to "rule on the written objections and make final determinations that it believes the evidence warrants." § 290.262.6 RSMo. While the wage rate reports and collective bargaining agreements can constitute competent and substantial evidence upon which the Commission can establish a prevailing wage rate, nothing restricts us to considering only the contractor reports previously submitted to the Division in determining the correct wage rate for a craft. *City of Kennett v. Labor and Industrial Relations Commission*, 610 S.W.2d 623, 627 (Mo. App. 1981). We base our decision on all of the evidence submitted at the hearing.

The "prevailing wage" means the highest number of hours worked and paid at a given rate of pay in a locality in which public work is to be performed by workers engaged in work of similar character. § 290.210(5) RSMo; *Branson R-IV School District v. Labor and Industrial Relations Commission*, 888 S.W.2d 717, 721 (Mo. App. 1994). The wage rate is calculated by the mode method of statistical analysis, which dictates that the prevailing wage is the most frequently paid actual wage for a person in a given trade. *Central Missouri Plumbing v. Plumbers Local Union 35*, 908 S.W.2d 366, 371 (Mo. App. 1995). In setting the prevailing wage rate, it is appropriate to aggregate the number of hours worked at the collectively bargained rate in effect both before and after an incremental rate increase. *HTH Companies, Inc., v. Missouri Labor and Industrial Relations Commission*, 995 S.W.2d 503 (Mo. App. 1999)(HTH I). In addition, during the hours spent working with tools, a working foreman is a "workman" as defined by the prevailing wage law. § 290.230 RSMo.

Wage and Hour Information Submitted after March 1, 2006

Allen E. Dillingham, Director for the Division, testified on behalf of the Division. Mr. Dillingham testified that the Division conducts wage surveys on an ongoing basis. The majority of the wage rate information is periodically reported to the Division by various entities through the filing of Contractor's Reports of Construction Wage Rates (contractor reports). Absent information to the contrary, the Division accepts the information on the contractor reports at face value.

In November 2005, the Division mailed a letter to many parties, including Objector. The letter explained the wage survey process and informed parties that, "[w]age information should be submitted no later than February 1, 2006, so it can be considered by the Division to determine wage rates for Annual Wage Order No. 13 due in March 2006." Mr. Dillingham testified that the Division considered wage information submitted by March 1, 2006.

On April 6, 2006, Objector filed wage information with its Objections. The Division argues that the wage information should not be considered when determining the prevailing wage for the

counties to which it pertains because it was submitted after March 1, 2006. Objector argues that by refusing to accept and consider wage and hour information submitted after March 1, 2006, the Director of the Division of Labor Standards engaged in an act of rulemaking without following the rulemaking procedures required by Chapter 536 of the Revised Statutes of Missouri. We need not determine whether the Division Director's decision is an act of rulemaking to determine the Objection before us.

Section 290.262 RSMo, governs the determination of prevailing wages upon objection and provides in relevant part:

5. The department at its discretion may hear each written objection separately or consolidate for hearing any two or more written objections. At the hearing the department shall first introduce in evidence the investigation it instituted and the other facts which were considered at the time of the original determination which formed the basis for its determination. The department, or the objector, or any interested party, thereafter may introduce any evidence that is material to the issues.

6. Within twenty days of the conclusion of the hearing, the department shall rule on the written objection and make the final determination that it believes the evidence warrants. Immediately, the department shall file a certified copy of its final determination with the secretary of state and with the department and shall serve a copy of the final determination on all parties to the proceedings by personal service or by registered mail.

(Emphasis added).

The statute governing the issuance of the final wage determination requires that we allow Objector to introduce any evidence that is material to the issues and that we issue the final determination that the evidence warrants. In compliance with the mandate of the statute, we will consider all material evidence presented at the hearing in reaching our determination.

Objection 13

Greene County – Building Construction Wage Rate Operating Engineers (Group III)

At the time of the filing of Annual Wage Order No. 13, the following contractor reports were in the possession of the Division. The reports submitted hours identified as being for work performed in Greene County under the occupational work title Operating Engineer – Group III:

<u>Contractor</u>	<u>Job</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
Pretressed Casting	oiler	510.50	17.25	8.83
	oiler	47.50	17.25	8.83
SDS Builders	forklift	629.00	17.85	8.83
	oiler	687.50	17.25	8.83
Hayes Drilling	oiler	271.00	17.25	8.83
Arrow Drilling	oiler	25.50	17.25	8.83

Based upon the above reports, the Division concluded that Operating Engineers – Group III, worked 1542 hours at the rate of \$17.25 / \$8.83. Based upon the information available to the Division at the time Annual Wage Order 13 was issued, this was the rate at which the highest number of Operating Engineer – Group III hours were worked in Greene County. The Division determined that this rate prevails subject to any adjustment in the governing collective bargaining agreement.

The collective bargaining agreement between Builders Association (Springfield Area) and Operating Engineers Local No. 101 identifies work performed by its members operating an oiler as Group IV work. The rate sheet in effect at the time of the issuance of the Annual Wage Order No. 13 (effective April 1, 2006) provided for a wage rate for Group III of \$18.45 / \$9.27 and a wage rate for Group IV of \$17.85 / \$9.27.

Through Annual Wage Order No. 13, the Division set the prevailing building construction wage rate for Operating Engineer – Group III for Greene County as \$17.85 / \$9.27.

Objector provided Employer Contribution Reports used by Objector for the purpose of allocating fringe benefit funds. The number of hours worked by each employee is listed on the Employer Contribution Reports but the amount of cash wages paid to the employee is not listed. Objector's business representative, Ed Reidesel, testified that all of the hours reported on the Employer Contribution Reports were worked performing concrete pumping in Greene County.

We have reviewed the 8 CSR 30-3.060(8)(O)1. The Division correctly points out that forklift activities (except masonry forklift) fall within the occupational title of Operating Engineer – Group II. As such, the 629 forklift hours listed in the table, supra, are immaterial and irrelevant to our determination of the prevailing wage for Operating Engineer – Group III.

The Division also correctly identifies that all pumping activities fall within Operating Engineer – Group II. See 8 CSR 30-3.060(8)(O)1.B. Mr. Riedesel testified that Objector's members only perform concrete pumping for Brundage Bone Concrete Pumping. Mr. Riedesel admits that concrete pumping activities fall within Group II. The hours reported on Objector's Exhibit A, Tab 7, are irrelevant to our determination of the prevailing wage for Operating Engineer – Group III.

We are left with contractor reports establishing 1542 hours of oiler activities, which activities are classified as Operating Engineer – Group III under 8 CSR 30-3.060(8)(O). These 1542 hours reported at \$17.25 / \$8.83 prevail.

Our final inquiry is whether this rate is a collectively bargained rate. If so, the prevailing wage will be adjusted for any collectively bargained increase to the rate we determine has prevailed. Under the collective bargaining agreement, the occupational title of oiler has been classified under Group IV. For clarity, we refer to the collective bargaining agreement classification as CBA-IV. Our review of the collective bargaining agreement reveals that \$17.25 was the collectively bargained rate for the CBA-Group IV effective April 1, 2005. Accordingly, the prevailing wage for Operating Engineer – Group III in Greene County is the wage currently in effect for CBA-Group IV. Effective April 1, 2006, the collectively bargained adjusted rate for CBA-Group IV title of oiler is \$17.85 / \$9.27.

We overrule Objection No. 13. We uphold the Division's initial determination that the prevailing building construction wage rate for the occupational title of Operating Engineer – Group III in Greene County is \$17.85 / \$9.27.

Objection 15**Taney County – Building Construction Wage Rate
Operating Engineers (Group III)**

At the time of the filing of Annual Wage Order No. 13, the following contractor reports were in the possession of the Division. The reports submitted hours identified as being for work performed in Taney County under the occupational work title Operating Engineer – Group III:

<u>Contractor</u>	<u>Job</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
BSC Steel	forklift	222.00	17.85	8.83
Pretressed Casting	oiler	387.50	17.25	8.83
Hayes Drilling	forklift	8.50	17.85	8.83
	oiler	152.00	17.25	8.83

Based upon the above reports, the Division concluded that Operating Engineers – Group III, worked 539 hours at the rate of \$17.25 / \$8.83. Based upon the information available to the Division at the time Annual Wage Order 13 was issued, this was the rate at which the highest number of Operating Engineer – Group III hours were worked in Taney County. The Division determined that this rate prevails subject to any adjustment in the governing collective bargaining agreement.

The collective bargaining agreement between Builders Association (Springfield Area) and Operating Engineers Local No. 101 identifies work performed by its members operating an oiler as Group IV work. The rate sheet in effect at the time of the issuance of the Annual Wage Order No. 13 (effective April 1, 2006) provided for a wage rate for Group III of \$18.45 / \$9.27.

Through Annual Wage Order No. 13, the Division set the prevailing building construction wage rate for Operating Engineer – Group III for Taney County as \$17.85 / \$9.27

We have reviewed the 8 CSR 30-3.060(8)(O)1. The Division correctly points out that forklift activities (except masonry forklift) fall within the occupational title of Operating Engineer – Group II. As such, the 230.50 forklift hours listed in the table, supra, are immaterial and irrelevant to our determination of the prevailing wage for Operating Engineer – Group III.

We are left with contractor reports establishing 539.50 hours of oiler activities, which activities are classified as Operating Engineer – Group III under 8 CSR 30-3.060(8)(O). These 539.50 hours reported at \$17.25 / \$8.83 prevail.

Our final inquiry is whether this rate is a collectively bargained rate. If so, the prevailing wage will be adjusted for any collectively bargained increase to the rate we determine has prevailed. Under the collective bargaining agreement, the occupational title of oiler has been classified under Group IV. For clarity, we refer to the collective bargaining agreement classification as CBA-IV. Our review of the collective bargaining agreement reveals that \$17.25 was the

collectively bargained rate for the CBA-Group IV effective April 1, 2005. Accordingly, the prevailing wage for Operating Engineer – Group III in Taney County is the wage currently in effect for CBA-Group IV. Effective April 1, 2006, the collectively bargained adjusted rate for CBA-Group IV title of oiler is \$17.85 / \$9.27.

We overrule Objection No. 15. We uphold the Division's initial determination that the prevailing building construction wage rate for the occupational title of Operating Engineer – Group III in Taney County is \$17.85 / \$9.27.

Objection 16

Ozark County – Building Construction Wage Rate

Operating Engineers (Group II)

At the time of the filing of Annual Wage Order No. 13, the following contractor reports were in the possession of the Division. The reports submitted hours identified as being for work performed in Ozark County under the occupational work title Operating Engineer – Group II:

<u>Contractor</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
Brundage-Bone	4.15	14.94	8.60

Finding no rate in the collective bargaining agreement corresponding to the 14.94 hourly rate, the Division did not adopt the provisions of the collective bargaining agreement. Through Annual Wage Order No. 13, the Division set the prevailing building construction wage rate for Operating Engineer -- Group II for Ozark County as \$14.94 / \$8.60.

Mr. Reidesel explained that \$14.94 was a training rate contained within an addendum to the Collective Bargaining Agreement between Operating Engineers Local 101 and Brundage-Bone Concrete Pumping (Objector's Exhibit A-10). As far as Mr. Reidesel is aware, the Brundage-Bone trainee program is not registered with any appropriate agency of the federal government. Mr. Reidesel could not identify what individuals worked the 4 hours and 15 minutes reported.

Objector argues that the Commission should exclude from consideration the 4 hours and 15 minutes reported at the Brundage-Bone trainee wage rate of \$14.94 and instead adopt the journeyman wage rate as set forth in the collective bargaining agreement as the prevailing wage. The Division argues that the Division is unable to exclude the hours because Objector has failed to prove the hours were worked by trainees, "employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the United States Department of Labor, Employment and Training Administration," as required by 8 CSR 30-3.030(3).

We agree with the Division's analysis. There is no evidence to establish that the 4 hours and 15 minutes were worked by trainees meeting the above-quoted requirements. The 4 hours and 15 minutes worked at \$14.94 / \$8.60 must be considered and they prevail.

We overrule Objection No. 16. We uphold the Division's initial determination that the prevailing building construction wage rate for the occupational title of Operating Engineer – Group II in Ozark County is \$14.94 / \$8.60.

Objection 17**Vernon County – Building Construction Wage Rate****Operating Engineers (Group II)**

At the time of the filing of Annual Wage Order No. 13, the following contractor reports were in the possession of the Division. The reports submitted hours identified as being for work performed in Ozark County under the occupational work title Operating Engineer – Group II:

<u>Contractor</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
Brundage-Bone	5.15	14.94	8.60
	4.45	17.95	8.60
	4.15	17.85	8.60

Based upon the above reports, the Division concluded that Operating Engineers – Group II, worked 5.15 hours at the rate of \$14.94 / \$8.60. Based upon the information available to the Division at the time Annual Wage Order No. 13 was issued, this was the rate at which the highest number of Operating Engineer – Group II hours were worked in Vernon County. The Division determined that \$14.94 / \$8.60 prevails.

Finding no rate in the collective bargaining agreement corresponding to the \$14.94 hourly rate, the Division did not adopt the provisions of the collective bargaining agreement. Through Annual Wage Order No. 13, the Division set the prevailing building construction wage rate for Operating Engineer – Group II for Vernon County as \$14.94 / \$8.60.

Objector argues that the Commission should exclude from consideration the 5 hours and 15 minutes reported at the Brundage-Bone trainee wage rate of \$14.94. The Division argues that the Division is unable to exclude the hours because Objector has failed to prove the hours were worked by trainees, "employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the United States Department of Labor, Employment and Training Administration," as required by 8 CSR 30-3.030(3).

We agree with the Division's analysis. There is no evidence to establish that the 5 hours and 15 minutes were worked by trainees meeting the above-quoted requirements. The 5 hours and 15 minutes worked at \$14.94 / \$8.60 must be considered and they prevail.

We overrule Objection No. 17. We uphold the Division's initial determination that the prevailing building construction wage rate for the occupational title of Operating Engineer – Group II in Vernon County is \$14.94 / \$8.60.

Objection 18

Greene County – Heavy Construction Wage Rate

Operating Engineers (Group II)

At the time of the filing of Annual Wage Order No. 13, the following contractor reports were in the possession of the Division. The reports submitted hours identified as being for work performed in Greene County under the occupational work title Operating Engineer – Group II:

<u>Contractor</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
APAC	44.50	20.47	8.60
Brundage-Bone	25.75	14.94	8.60
	25.50	15.68	8.60
	7.50	16.94	8.60
	8.75	18.55	8.60
	96.45	19.93	8.60

Based upon the above reports, the Division concluded that Operating Engineers – Group II, work 96.75¹ hours at the rate of \$19.93 / \$8.60. Based upon the information available to the Division at the time Annual Wage Order 13 was issued, this was the rate at which the highest number of Operating Engineer – Group II hours were worked in Greene County. The Division determined that this rate prevails subject to any adjustment in the governing collective bargaining agreement.

Through Annual Wage Order No. 13, the Division set the prevailing building construction wage rate for Operating Engineer -- Group II for Greene County as \$19.93 / \$8.60.

On or about April 7, 2006, Objector provided to the Division payroll records of APAC purporting to support the following previously unreported Operating Engineers – Group II hours worked in Greene County:

<u>Contractor</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fringe Benefits</u>
APAC	163.50	20.47	8.60

We find credible the payroll records of APAC (Objector's Exhibit 13) for work in Greene County. We combine the 163.50 hours worked at \$20.47 / \$8.60 with the 44.5 hours already considered by the Division. We conclude that the 208 hours worked at \$20.47 / \$8.60 prevails.

¹ It appears Brundage-Bone used a convention of reporting quarter-hour increments after the decimal point. For example, 4.15 equals 4 hours and 15 minutes; 4.3 equals 4 hours and 30 minutes, and 4.45 equals 4 hours and 45 minutes. The Division entered the portion after the decimal point in tenths/hundredths of an hour such that 4.3 is counted as 4.3 hours. Using the Brundage-Bone convention, the hours reported are: 25.75 hours @ \$14.94, 25.50 hours @ \$15.68, 7.50 hours @ \$16.94, 8.75 hours @ \$18.55, 98.75 hours @ \$19.93. The difference in convention does not affect the our determination.

Order

Local Union No. 101 of the International Union of Operating Engineers

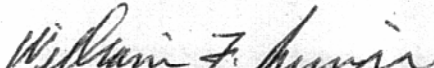
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We sustain Objection No. 18. Taking into account the increase reflected by the rate sheet set out at Objector's Exhibit 15, the prevailing heavy construction wage rate for Operating Engineer – Group II in Greene County is \$21.02 / \$9.30.

Given at the City of Jefferson, State of Missouri, this 29th day of June 2006.


LABOR AND INDUSTRIAL RELATIONS COMMISSION



William F. Ringer, Chairman

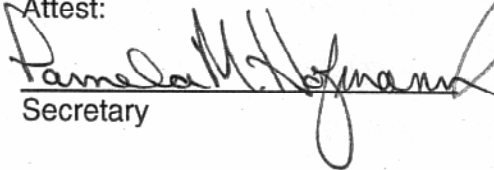


Alice A. Bartlett, Member



John J. Hickey, Member

Attest:


Secretary